

1 JOHN D. MUNDING  
2 CRUMB & MUNDING, P.S.  
3 601 W. Riverside, Suite 1950  
4 Spokane, WA 99201  
5 Telephone: (509) 624-6464  
6 Fax: (509) 624-6155  
7 Email: munding@crumb-munding.com

JUDGE WILLIAMS

8 UNITED STATES BANKRUPTCY COURT  
9 EASTERN DISTRICT OF WASHINGTON

10 THE CATHOLIC BISHOP OF  
11 SPOKANE a/k/a THE CATHOLIC  
12 DIOCESE OF SPOKANE,

Debtor.

NO. 04-08822-PCW11  
Chapter 11

13 COMMITTEE OF TORT LITIGANTS,

14 Plaintiff,

Adversary No. 05-80038-PCW

15 Vs.

16 THE CATHOLIC DIOCESE OF  
17 SPOKANE, et al.,

Defendants.

ST. ANNE – MEDICAL LAKE – PARISH'S  
OPPOSITION TO  
SUMMARY JUDGMENT

18  
19 St. Anne – Medical Lake – and its Parishioners (“St. Anne”), in opposition to the Tort  
20 Litigant Committee’s (the “Committee”) Motion for Summary Judgment (Docket Nos. 63-67,  
21 72), submits the following memorandum of law. This memorandum incorporates and is  
22 supported by the Affidavit of the Reverend John Krier, the Declaration of David Tareski,  
23 Parishioner, and Defendants’ Omnibus Statement of Facts (LR 7056). St. Anne also  
24 adopts and incorporates those Affidavits filed by other Defendants opposing Plaintiff’s  
25 Motion.  
26

ST. ANNE PARISH'S OPPOSITION  
TO SUMMARY JUDGMENT - 1

CRUMB & MUNDING, P.S.  
SUITE 1950  
601 W. RIVERSIDE AVENUE  
SPOKANE, WA 99201  
(509) 624-6464  
FAX (509) 624-6155

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

I.

RELIEF REQUESTED

The Committee's attempt to deny St. Anne its ownership interest in real property that St. Anne paid for, improved, and uses in fulfillment of its religious tenets must be rejected. The undisputed evidence demonstrates that:

1. Neither the Committee, its members, nor the Debtor have any beneficial interest in the real property belonging to St. Anne;

2. Neither the Committee, its members, nor the Debtor have a legal basis to justify the taking of real property from St. Anne, a non-debtor; and

3. St. Anne's equitable and beneficial ownership interest in the real property is clearly established by non-bankruptcy law.

As a matter of both law and fact, the Committee's Motion for Summary Judgment/Declaratory Relief seeking to deprive St. Anne of fundamental property rights and religious freedoms must be denied.

II.

PROCEDURAL HISTORY

A. The Bankruptcy

A voluntary petition under Chapter 11 of the Bankruptcy Code was filed by the Catholic Diocese of Spokane, a corporation sole ("Debtor"), on December 6, 2004 (Petition Date). The Bankruptcy Court entered the Order for Relief, adjudicating the Diocese a Chapter 11 Debtor. Since that date, the Debtor has acted as the Debtor-in-Possession pursuant to 11 USC 1108. The Debtor duly filed and subsequently amended its Schedules and Statement of Financial Affairs. (See Main Case Docket Nos. 19, 41-42)

Within its Statement of Financial Affairs, the Debtor describes certain real property to which it holds "bare legal title." The Statement of Affairs explains that equitable/beneficial title to such real property is held by other entities, including St. Anne. This description is accurate concerning the true ownership of the real property and supported by both facts

1 and applicable law. Neither the Debtor nor St. Anne disputes this particular trust  
2 relationship.

3  
4 **B. Appointment of Creditors Committee**

5 On February 2, 2005, the Court entered an Order duly approving the appointment of  
6 the Committee. (Main Case Docket No. 206) The Committee consists of individuals who  
7 filed complaints against the Diocese in the Superior Court of the County of Spokane, State  
8 of Washington. Neither the Committee nor its members have asserted a claim in State  
9 Court against St. Anne or identified any legal relationship with St. Anne.

10 The legal standing of the Committee to seek declaratory relief against non-debtors in  
11 this manner is disputed and the subject of a pending motion to dismiss. (See Section II.F.)

12 **C. The Adversary**

13 On February 4, 2005, the Committee filed a three count Complaint ("Complaint") in  
14 this adversary proceeding ("Adversary Proceeding"), specifically:

- 15 • FIRST CAUSE OF ACTION  
16 (Declaratory Relief: The Disputed Real Property)
- 17 • SECOND CAUSE OF ACTION  
18 (Declaratory Relief: the Disputed Personal Property)
- 19 • THIRD CAUSE OF ACTION  
20 (Declaratory relief: Substantive Consolidation)  
21 (Docket No. 1, Complaint)

22 Although property is allegedly "disputed," the Committee does not have or assert a  
23 legal claim to or legal interest in the real or personal property. (See Complaint, pp. 13-15.)

24 The relief sought by the Committee is drafted as equitable, although it is clearly of  
25 the nature and effect of relief determining property rights of non-debtors. Specifically,

- 26 1. Declaring that the Disputed Real Property is property of the estate under 11  
U.S.C. § 541(a)(1) as of December 6, 2004;

1           2.       Declaring that the Disputed Personal Property is property of the estate under  
2 11 U.S.C. § 541(a)(1) as of December 6, 2004;

3           3.       Ordering the Debtor to amend its Amended Statement of Financial Affairs and  
4 its Amended Schedules of Assets and Liabilities to reflect that the Disputed Real Property  
5 and the Disputed Personal Property are all property of the estate;

6           4.       Ordering substantive consolidation, nunc pro tunc, of the Debtor's bankruptcy  
7 estate with the [Diocese-Related Entities] effective as of December 6, 2004.

8           (Adv Complaint, p. 15)

9           By way of the Complaint, the Committee seeks to determine the property rights and  
10 interests of not only St. Anne, but of 82 non-debtors. The Complaint seeks to deprive those  
11 non-debtors of their instrumentalities used in religious worship, faithful exercise of its  
12 mission, activities, and ministries.

#### 13 **D.    Motion for Avoidance Powers**

14           On February 7, 2004, the Committee filed a motion in the main case seeking  
15 avoidance powers. (Main Case Docket Nos. 223-224) The motion was heard on May 2,  
16 2005. The court continued hearing on this matter for an indefinite period (approximately 5  
17 to 6 months) with any counsel being able to renote this matter on 20 days notice.  
18 (Main Case Docket No. 393)

#### 19 **E.    Motion for Summary Judgment**

20           The Committee filed the present motion for summary judgment ("Motion") on April  
21 17, 2005. (Adv. Docket No. 63)

22           The Motion seeks specific relief defining title and ownership of at least 22 separate  
23 parcels of real property which belong to at least 22 different and distinct Defendants.  
24 Although the Committee's Motion indicates that they have restricted summary judgment to  
25 their first cause of action, the Memorandum aggressively seeks a ruling on their third cause  
26 of action by way of an "alter ego" argument.

          The Committee's Motion attempts to "lump" St. Anne's real property with other  
Defendants' real property interests, dealing with all parcels of property collectively,

1 including all improvements and fixtures. However, each parcel of real property is a  
2 separate parcel of property, with separate and distinct ownership interest, and separate  
3 factual circumstances surrounding each parcel's acquisition, improvement, maintenance,  
4 and use. The committee's standardized factual scenario is inapplicable and not an  
5 appropriate basis for declaratory relief against St. Anne.

6 **F. Motion to Dismiss Adversary Proceeding**

7 On May 2, 2005, the Parish Defendants filed a motion under FRBP 7012 seeking to  
8 dismiss this Adversary Proceeding on the following grounds:

9 The Committee's Complaint should be dismissed on either of two (2)  
10 separate grounds.

11 1. Nothing contained within the express language of Section  
12 521(1) or 541(a) clearly, explicitly, or unambiguously confers standing to a  
creditors committee to file suit against non-debtors to define a non-debtor's  
property rights.

13 2. The Bankruptcy Court and Federal District Court lack subject  
14 matter jurisdiction over the claims alleged in the Committee's Complaint  
15 because there is no case or controversy between the Committee and the  
Parishes within the meaning of the Declaratory Judgment Act and Article III of  
the U.S. Constitution.

16 (Docket Nos. 99-100)

17 This motion is set to be heard on June 27, 2005.

18  
19 **III.**

20 **NON-CORE PROCEEDING**

21 The Committee asserts in its Complaint that this is a "core proceeding" under 28  
22 USC § 157(b) and 1334(b). The Parishes, based upon the declaratory nature of the relief  
23 sought in the Complaint, deny that this is a core proceeding. This action exclusively seeks  
24 declaratory relief against over 80 non-debtor defendants to determine the property rights of  
25 separate legal entities. The Complaint does not present a federal question nor is there  
26 diversity between the litigants.

1 The present adversary action has the effect of a defacto quiet title action as to non-  
2 debtor defendants. As such, it could have easily been brought in state Superior Court  
3 pursuant to RCW 7.28.010 et seq., regardless of whether the Debtor was in bankruptcy.

4 For purposes of this Adversary Proceeding, St. Anne does not consent to entry of  
5 Findings of Fact and Conclusions of Law and does not waive defenses related to Plaintiff's  
6 standing and failure to state a claim. (See Docket Nos. 88, 99-100.)

#### 7 IV.

#### 8 STATEMENT OF FACTS

9 St. Anne is a parish comprised of approximately 225 households. (Aff. of J. Krier, ¶  
10 6) Under Canon Law, St. Anne is a separate and distinct legal entity known as a juridic  
11 person. [Canons §113-115, §515] Under Civil Law, St. Anne is an unincorporated  
12 association. (Committee's Statement of Undisputed Fact, No. 23) The property in issue in  
13 the Committee's motion is identified as: Lots 1-10 inclusive of Block 26 of Hallet's First  
14 Addition to the Town of Medical Lake. (Aff. J. Krier ¶ 4) A portion of this land is, and has  
15 been used for years as a cemetery. (Aff. J. Krier ¶ 7)

16 St. Anne has held and used this land, and made numerous improvements on this  
17 land over the years. (Aff. J. Krier ¶ 5; Dec. D. Tareski ¶¶ 4, 5) The money needed for  
18 these improvements was raised by parishioners from parishioners for the sole benefit of St.  
19 Anne Parish. (Dec. D. Tareski ¶¶ 5, 6) Since its establishment, the parish of St. Anne has  
20 been comprised of, built, improved and maintained by gifts, donations and tithes of  
21 parishioners. (Aff. J. Krier ¶ 9)

22 The financial strength or weakness of a parish is dependent almost entirely upon its  
23 Christian faithful. (Aff. J. Krier ¶ 9) Offerings, gifts, and tithes are made by Parishioners of  
24 the Parish, for the financial well being of the Parish. (Aff. J. Krier ¶ 9; Dec. D. Tareski ¶¶ 7,  
25 10, 11) St. Anne, since its inception, has raised money through weekly collections, tithes,  
26 gifts, and capital campaigns. (Aff. J. Krier ¶ 9) In recognition of the donations by  
Parishioners, St. Anne issues a statement at the end of each year to each specific donor.  
(Dec. D. Tareski ¶ 15)

St. Anne, at tremendous cost to its members, has improved the real property  
significantly. These improvements to the real property were conducted with money, gifts,

1 tithes, labor, and material donated by the Parishioners for the sole use, benefit, and  
2 improvement of St. Anne's property. (Dec. D. Tareski ¶ 5)

3 Consistent with its ownership of the real property, St. Anne, through its Parishioners,  
4 has paid all insurance premiums, completed and paid all fees with tax exempt forms related  
5 to the real property, and paid all local assessments. (Aff. J. Krier ¶¶ 7,8)

6 In addition to holding a beneficial and equitable ownership interest in the real  
7 property in question, St. Anne clearly exists as its own independent entity.

8 Over the years since its inception St. Anne has engaged in the use of the Diocese's  
9 Deposit and Loan Fund. Parish Money (which is traceable back to St. Anne bank accounts  
10 and further to donations from Parishioners) is placed on deposit in the Fund with the clear  
11 expectation of its return to St. Anne for its use. (Dec. D. Tareski ¶ 6) The payments made  
12 on the loan were made from parishioner donations. (Dec. D. Tareski ¶ 6)

13 In addition to banking with the Diocese Deposit and Loan, St. Anne banks in the  
14 public sector. Its accounts are with recognized banking institutions, held in St. Anne's  
15 name. (Aff. J. Krier ¶ 10)

16 St. Anne is truly an independent entity both legally and financially. For example, St.  
17 Anne has its own TIN, maintains its own financial records, employs individuals, and hold  
18 title to personal property in its name. (Aff. J. Krier ¶ 10-13.)

19 St. Anne's ownership interest in its property has never been disputed by the  
20 Diocese, nor has St. Anne's separate identity. (Aff. J. Krier ¶ 5) There has never been any  
21 confusion that money donated by parishioners was for the benefit of St. Anne and not for  
22 the Diocese. (Dec. D. Tareski ¶ 5, 7) All fund raising and donations received by St. Anne  
23 are the result of Parishioner efforts, and the Diocese has not in any way helped collect  
24 money for St. Anne. (Dec. D. Tareski ¶ 11)

25 Contrary to the Committee's conclusions, the facts demonstrate St. Anne is its own  
26 legal entity and is the true owner of all equitable and beneficial interest of the real property  
identified as "St. Anne – Medical Lake" by the Committee.



V.

STANDARDS OF REVIEW

A. Declaratory Judgment Standard.

The Committee glosses over the fact that the relief it seeks is entirely declaratory in nature. A declaratory judgment action is ripe for adjudication only where an "actual controversy" exists. Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5<sup>th</sup> Cir. 2000). "As a general rule, an actual controversy exists where 'a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse legal interests.'" Id., citing Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5<sup>th</sup> Cir. 1986).

Although some Bankruptcy Courts have entertained declaratory judgment actions filed by trustees when the ownership interest of an asset was in dispute which the trustee asserted was property of the estate on the petition date, the present case is not advanced by a trustee or Debtor-in-Possession. See In re Challenge Air Int'l. Inc., 952 F.2d 384 (11<sup>th</sup> Cir. 1992); In re Taylor & Campaigne, Inc., 157 B.R. 493 (Bankr. M.D. Fla. 1993); Bottom v. Bottom, 176 B.R. 950 (Bankr. N.D. Fla. 1994); In re Ocean Beach Club, Inc., 79 B.R. 505 (Bankr. S.D. Fla. 1987).

There is no legal relationship between St. Anne, the Committee, or any Committee members. Furthermore, there is no legal dispute between St. Anne and the Debtor regarding the ownership interests in real property or trust relationship between the Debtor and St. Anne. It is correctly described and defined in the Debtor's Statement of Affairs in accordance with the relationship between the parties as established by Canon Law and Civil Law. As such, no actual controversy between parties with adverse legal interests exists.

B. Summary Judgment Standard.

The party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden, he is not entitled to judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 26, L.Ed.2d 142, 90 S. Ct. 1598 (1970).



1 In determining whether there are any genuine issues of material fact, the Court must  
2 view the evidence in the light most favorable to the nonmoving party. Summers v. A.  
3 Teichert & Son, Inc., 127 F.3d 1150, 1152 (9<sup>th</sup> Cir. 1997). The party opposing summary  
4 judgment to survive the motion need only present evidence from which a jury might return a  
5 verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. Id. at  
6 1039, citing Anderson v. Liberty Lobby, Inc.

7 The Committee has failed to produce any evidence to support its contention that the  
8 beneficial and equitable ownership of the real property does not belong to St. Anne.

9 However, St. Anne has not only produced reasonable evidence as to a material  
10 issue of fact as to its ownership interest in the real property, it has also produced  
11 overwhelming evidence that St. Anne is the true owner of the real property in question.

## 12 VI.

### 13 LEGAL ANALYSIS PREVENTING DECLARATORY RELIEF 14 CONCERNING REAL PROPERTY OWNERSHIP

#### 15 A. Whether Applying Civil Law Or Canon Law, St. Anne Parish Is A 16 Separate And Distinct Legal Entity.

17 The Committee has conceded that Parishes are unincorporated associations.  
18 (See, Committee Statement of Undisputed Fact No. 23) The Committee's  
19 acknowledgment of St. Anne's status as a separate legal entity from the Debtor is  
20 consistent with both Civil and Canon Law.

#### 21 1. Washington Law Recognizes St. Anne As A Legal Entity.

22 The Parish, as an unincorporated association, is a separate legal entity under  
23 Washington law. A Parish consists of its Christian faithful. (Canon 515(1)) The Christian  
24 faithful ("Parishioners") of each Parish are the residents of their local community. They are  
25 residents of cities, towns, and counties within Eastern Washington, in some cases they are  
26 members of sovereign Indian tribes. The Parishioners are the epitome of a voluntary group

1 pursuing a common purpose. In the case of each parish, the common purpose is the  
2 fulfillment of their religious tenets.

3 An "unincorporated association" is defined as "[a] [v]oluntary group of persons,  
4 without a charter, formed by mutual consent for the purpose of promoting common  
5 enterprise or prosecuting common objective. An organization composed of a body of  
6 persons united with a charter for the prosecution of a common enterprise." *Black's Law*  
7 *Dictionary*, 1531 (6<sup>th</sup> 1991). This is a broad definition, and Washington has recognized that  
8 "associations vary in their nature." *Riss v. Angel*, 131 Wn.2d 612, 635 (1997).  
9 Washington's case law recognizes a variety of forms of unincorporated associations,  
10 including groups of individuals of a particular religion or creed. See *Bacon v. Gardner*, 38  
11 Wn.2d 299 (1951), *Church of Christ v. Carder*, 105 Wn.2d 204 (1986).

12 Unincorporated associations clearly have the ability to hold the equitable interests of  
13 a trust and defend that interest in court. *Leslie v. Midgate Center, Inc.*, 72 Wn.2d 977  
14 (1967). Washington has repeatedly acknowledged the legal capacity of unincorporated  
15 associations to be parties to lawsuits. *Bacon v. Gardner*, 38 Wn.2d 299, 304 (1951); *State*  
16 *v. Bothell*, 89 Wn.2d 862, 866 (1978); see also *Church of Christ v. Carder*, 105 Wn.2d 204,  
17 206 (1986); *Riss*, 131 Wn.2d 612 (1997). By statute, unincorporated associations have the  
18 capacity to appear and represent their interests in declaratory judgment actions. *RCW* §§  
19 *7.24.110 - .130* (West 2005). It is well settled law that unincorporated associations have  
20 the ability to represent the interests of their members in legal actions. See, *State v. Bothell*,  
21 89 Wn.2d at 866.

22 It is important to note that not a single case quoted by the Committee in support of  
23 its assertion that each Parish is not a legal entity is from the state of Washington.  
24 Bankruptcy Rule 7017 incorporates Rule 17(b), Fed. R. Civ. P., as follows:

25 The capacity of an individual, other than one acting in a representative  
26 capacity, to sue or be sued shall be determined by the law of the individual's  
domicile. The capacity of a corporation to sue or be sued shall be determined  
by the law under which it was organized. In all other cases capacity to sue or  
be sued shall be determined by the law of the state in which the district court  
is held . . . .

1 As a matter of law, unincorporated associations can be sued under Washington law.  
2 The various cases cited by the Committee have no precedential value here in Washington.  
3 The Committee's argument that St. Anne does not have a legal existence separate from  
4 the Diocese fails as a matter of law. It is also inconsistent with Committee's Statement of  
5 Undisputed Fact No. 23.

## 6 **2. St. Anne Is A Separate Legal Entity Under Canon Law.**

7 The Law of the Roman Catholic Church ("Church") has been in existence since the  
8 first century. Presently, the Church is governed by the 1983 Code of Canon Law. To the  
9 extent the resolution of this matter requires a determination of the relationship between the  
10 Debtor and St. Anne in their methods of governance, interaction or management,  
11 compulsory deference is required to the provisions of the Code of the Canon Law which  
12 govern these religious organizations under applicable law. The Supreme Court, when  
13 faced with issues involving the Roman Catholic Church, has stated:

14 In the absence of fraud, collusion or arbitrariness, the decisions of proper  
15 church tribunals on matters purely ecclesiastical, although affecting civil  
16 rights, are accepted in litigation before the secular courts as conclusive,  
17 because the parties in interest made them so by contract or otherwise. Under  
18 like circumstances, effect is given in the courts to the determination of the  
19 judiciary bodies established by clubs and civil associations.

20 Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17, \_\_\_ S.Ct. \_\_\_, 74 L.Ed.131,  
21 137 (1929) (citing Watson v. Jones, 13 WALL 676, 20 L.Ed. 666 (\_\_\_)).

22 This legal principle has been clearly adopted by the Washington State Supreme  
23 Court, when addressing real property interests involving a hierarchal church. See,  
24 Wilkerson v. Rector, etc., St. Luke Parish, 176 Wash. 377 (1934); See also, Church of  
25 Christ v. Garder, 105 Wn.2d 204 (1986); Southside Tabernacle v. Church of God, 32 Wash.  
26 App. 814 (1982) (All applying the compulsory deference rule established in Watson to  
disputes involving church property.)

In this case, the identity of the Parish, the Parishioners, the Debtor, and their  
relationship to their property rights are defined within Canon Law. These relationships, are  
"purely ecclesiastical, though affecting civil rights, [and] are [to be] accepted in litigation

1 before secular courts as conclusive[.]” Gonzalez, 280 U.S. at 16, \_\_\_\_ S.Ct. at \_\_\_\_, 74 L.Ed.  
2 at 137.

3 Within the Church, besides physical persons, there are also juridic persons, that is,  
4 subjects in Canon Law of obligations and rights which correspond to their nature. (Canon  
5 113(2)) A juridic person is an artificial person distinct from all natural persons or material  
6 goods. Like a civil law corporation, it is a legal entity which can and must be conceived  
7 apart from the natural persons who constitute it, administer it, or for whose benefit it exists.  
8 See L. Chiappetta, *Il Codice d. Diritto Canonico: Comento Giuridico-Pastorale*, 2<sup>nd</sup> ed.  
9 (Rome: Dehoniane, 1996) 1:169; Robert Kennedy, *New Commentary on the Code of*  
10 *Canon Law* (Paulist Press 2000).

11 Canon Law provides that:

12 A parish is a certain community of the Christian faithful stably constituted in a  
13 particular church, whose pastoral care is entrusted to a pastor as its proper  
14 pastor under the authority of a diocesan bishop. (Canon 515(1))

15 Canon 515(3) states:

16 A legitimately erected parish possesses juridic personality by the law itself.  
17 (Canon 515(3))

18 In this case, there is no dispute that St. Anne is a legitimately erected Parish and a  
19 juridic person under Canon Law.

20 Canon Law is clear that property acquired by a Parish belongs to the Parish.  
21 Specifically, Canon 1256 states:

22 Under the supreme authority of the Roman Pontiff, ownership of goods  
23 belongs to that juridic person which has acquired them legitimately. (Canon §  
24 1256)

25 Since its inception, the Christian faithful themselves, which constitute the Parish,  
26 have acquired both real and personal property which is used by the Christian faithful in their  
fulfillment of their religious tenets. Under Canon Law, the property was acquired by, used  
by, improved, maintained, and owned by each Parish independently. (Canons 1257-1272)  
The juridic person (Parish) may not be deprived of its property without consent and  
approval. (See Canons 1281–1288 and 1291-1295)

1           **3. Committee Waived Argument on Individual Parish Standing.**

2           The Committee's decision to name and sue St. Anne and 81 other Parishes  
3 individually is evidence of the separate legal identity of each parish. Furthermore, the  
4 Committee admits that St. Anne is a separate unincorporated association in its Statement  
5 of undisputed Facts. (CSF No. 23) The doctrine of judicial estoppel prevents a party from  
6 taking divergent positions in different legal proceedings. Wagner v. Proff Engineers in  
California Court, 354 F.3d 1036, 1044 (9<sup>th</sup> Cir. 2004).

7           In addition, the request for relief in the Complaint seeks substantive consolidation of  
8 St. Anne with the Debtor. Substantive consolidation in bankruptcy terms is the  
9 consolidation of a non-debtor entity with a separate debtor entity. (See Alexander, 229  
10 F.3d 750 (9<sup>th</sup> Cir. 2000)) As such, the Committee has already recognized the legal identity  
11 of St. Anne is separate and apart from the Debtor. The Committee should be estopped  
12 from taking a contrary position for purposes of its Motion.

13           **4. Judicial Estoppel Does Not Apply to St. Anne.**

14           St. Anne does not dispute the definition of judicial estoppel submitted by the  
15 Committee which is designed to prevent a party from taking divergent positions in different  
16 legal proceedings. See the Committee's Memorandum at p. 18, citing Wagner v. Prof.  
Engineers in California Gov't, 354 F.3d 1036, 1044 (9<sup>th</sup> Cir. 2004). However, the  
17 Committee fails to present a full recitation of the elements required for a finding of judicial  
18 estoppel, and it is in those elements that the Committee's position is revealed to be flawed.

19           The United States Supreme Court recently listed three factors that  
20 courts may consider in determining whether to apply the doctrine of judicial  
21 estoppel:

22           First, a party's later position must be "clearly inconsistent" with its  
23 earlier position. Second, courts regularly inquire whether the party has  
24 succeeded in persuading a court to accept that party's earlier position, so that  
25 judicial acceptance of an inconsistent position in a later proceeding would  
26 create "the perception that either the first or the second court was misled[.]"  
Absent success in a prior proceeding, a party's later inconsistent position  
introduces no "risk of inconsistent court determinations," and thus no threat to  
judicial integrity. A third consideration is whether the party seeking to assert

1 an inconsistent position would derive an unfair advantage or impose an unfair  
2 detriment on the opposing party if not estopped. In enumerating these  
3 factors, we do not establish inflexible prerequisites or an exhaustive formula  
for determining the applicability of judicial estoppel. Additional considerations  
may inform the doctrine's application in specific factual contexts.

4 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-783 (9<sup>th</sup> Cir. 2001), citing New  
5 Hampshire v. Maine, 121 S. Ct. 1808, 1815 (2001) (internal citations omitted). The  
6 application of judicial estoppel is appropriate to bar litigants from making incompatible  
7 statements in two different cases. Risetto v. Plumbers & Steamers Local 343, 94 F.3d 597,  
8 605 (9<sup>th</sup> Cir. 1996).

9 The position taken by St. Anne is not inconsistent with the holding of the cases cited  
10 by the Committee. In Munns v. Martin, 131 Wn. 2d 192, 196 (1977) (*en banc*), the case  
11 was actually filed by the individual members of St. Patrick's Parishioners and Friends of  
12 Historic Preservation. Of the seven members, six were members of the Parish. Id. at 196.  
13 The issue arose when the "St. Patrick Building Committee," a parish committee, applied for  
14 a demolition permit related to St. Patrick School. This was a case of historic preservation  
15 interests vs. parish building committee interests, Parishioner v. Parishioner. Id. at 194-199.  
16 The case holding invalidated a statute that was being used by a non-parishioner in an  
17 attempt to stop a building project advanced by a parish building committee for the  
furtherance of the Church's fundamental right to exercise religion. The ordinance was  
found to have a coercive effect on the practice of religion.

18 The second case, Miller v. Catholic Bishop of Spokane, 2004 WL 2074328 (Wash.  
19 App. 2004), is an unpublished decision. As a matter of law, this opinion should not have  
20 been cited. "[U]npublished opinions of the Court of Appeals will not be considered in the  
21 Court of Appeals and should not be considered in the trial courts. They do not become a  
22 part of the common law of Washington." State v. Fitzpatrick, 5 Wn. App. 661, 668  
(1971)(emphasis added).

23 Regardless, in Miller, the Catholic Bishop of Spokane was sued for damages based  
24 upon the plaintiff's fall from a loft opening. The Bishop defended the action based on its  
25 ownership of the property, which was the Parish Hall of Sacred Heart Catholic Church in  
26 Springdale, Washington. However, this is not a position that is "clearly inconsistent" with



1 the current position taken by the Diocese and the Parishes. There is no assertion or  
2 indication as to the nature of the Bishop's ownership interest. In this bankruptcy case, the  
3 Diocese and the Parishes assert that the Diocese holds an ownership interest in the  
4 property, but holds that interest in trust for the Parishes. This is not an inconsistent  
5 position. Rather, the ownership status of the Bishop in Miller was never addressed or  
6 litigated. Further, the Bishop did not "succeed in persuading a court to accept that party's  
7 earlier position" because the **nature** of the Bishop's ownership interest was never at issue.  
8 Therefore the current position, which is consistent with the prior position, introduces no risk  
9 of inconsistent court determinations.

10 **5. The Committee's Reliance Upon F.E.L. Publication, Ltd. v. The Catholic**  
11 **Bishop of Chicago and Oregon Case Law is Misplaced.**

12 First, both Oregon and Illinois apply a neutral principle of law approach to church  
13 property issues. When examining church property disputes, Washington applies the more  
14 stringent approach of compulsory deference. Furthermore, the legislative histories and  
15 governing statutes concerning corporate soles is much different than that of Washington.

16 F.E.L Publications was a seventh circuit case which decided the issue on the legal  
17 relationship between the Diocese and the Parishes within it in order to resolve a claim  
18 against the diocese for tortious interference with a business relationship. There the Court  
19 held that it was impossible for the cause of action to be based on the Diocese's directives  
20 to the Parishes as those Parishes had no independent status, and were in fact "subsumed  
21 under the Catholic Church." F.E.L., 754 F.2d at 221. In concluding this, the court relied  
22 primarily upon Illinois case law, and in particular Haymes v. Catholic Bishop of Chicago, 41  
23 Ill.2d 336 (1968), Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400 (1919)  
24 and Galich v. Catholic Bishop of Chicago 75 Ill.App.3d 538 (1979). The case primarily  
25 relied upon was Galich, however, that issue was not before the court in Galich.

26 In Galich, the Court held that the statute under which the Bishop of Chicago  
incorporated did not create a statutory trust for the benefit of the Parishioners bringing the  
case. Further, the Court held that any determination of the ability or inability of the Bishop  
to demolish a church would violate the First Amendment.



1 The statute under which the case was decided was subsequently amended. As  
2 amended, it includes a great deal of language indicating a legislative intent to create a trust  
3 for the benefit of the religious congregation for whom the corporation is formed.

4 The other cases relied upon by the F.E.L. Court only support its conclusion by  
5 inference. In Haymes, the Catholic Bishop of Chicago was named the defendant in a slip  
6 and fall case at a Catholic school. While the issue was not addressed by the Court in  
7 Haymes, the implication is that the Catholic school could not have been the proper  
8 defendant. In Village of Palos Park, the Catholic Bishop of Chicago essentially challenged  
9 the validity of a local zoning ordinance precluding the creation of a cemetery in the space  
10 the Catholic Bishop wished to make one. Again, only by the inference that the Catholic  
11 Bishop was the only party which could have brought the action does this case support the  
12 conclusion reached by the F.E.L. Court.

13 **B. The Bankruptcy Estate Of The Diocese Does Not Have An Interest In The Real  
14 Property At Issue.**

15 The Committee argues in its Complaint and subsequent Motion that by virtue of its  
16 interpretation of law and facts that St. Anne's real and personal property is property of the  
17 Debtor's bankruptcy estate. However, this argument is not substantiated. Section 541 of  
18 the Bankruptcy Code specifically excludes from the estate property to which the Debtor  
19 holds legal title, but has no equitable or beneficial interest. (See 11 U.S.C. § 541(b), (c),  
20 and (d))

21 The concept of trust relationships, bare legal title, and beneficial/equitable ownership  
22 of property is not new to bankruptcy courts. Courts have repeatedly held that when a debtor  
23 holds mere legal title to property and a non-debtor holds the beneficial or equitable  
24 ownership of that property, said property is not property of the estate. See Matter of  
25 Torrez, 63 BR 751, 754-55 (9<sup>th</sup> Cir. BAP 1986)(imposition of resulting trust appropriate  
26 since title was only put in children's name to avoid certain restrictions in a government  
program); Sale of Guar. Corp., 220 BR 660, 664 (9<sup>th</sup> Cir. BAP 1998)(where the transferee of  
property does not pay the purchase price for the property, the transferee is presumed to

1 hold the property in a resulting trust for the party who paid the consideration for its  
2 purchase).

3 The standard of inquiry under section of the Bankruptcy Code excluding from  
4 property of the estate trust interests that are subject to transfer restrictions enforceable  
5 under applicable non-bankruptcy law, normally has three parts:

- 6 (1) whether the debtor has a beneficial interest in a trust;
- 7 (2) whether there is a restriction on the transfer of that interest; and
- 8 (3) whether the restriction is enforceable under non-bankruptcy law.

9 In re Wilcox, 233 F.3d 899 (6<sup>th</sup> Cir. 2000)

10 The evaluation of each element is resolved in accordance with and through the  
11 application of state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d  
12 136, 141-42 (1979).

13 Washington law clearly establishes that the Debtor holds only "bare legal title" to the  
14 property in question. St. Anne is the true beneficial and equitable ownership of the real  
15 property in dispute.

16 **1. St. Anne Parish Is The Beneficiary Of A Statutory Trust, Holding All  
17 Equitable And Beneficial Interest In The Real Property.**

18 The corporation sole statute in Washington clearly and explicitly creates a statutory  
19 trust comprised of the disputed property held for the benefit of the Church and its  
20 parishioners. RCW Ch. 24.12. The Debtor incorporated under this chapter in 1915.

21 The legislative history is absolutely clear that the statute was enacted to create a  
22 trust relationship. The bill, as introduced in the Senate by two Spokane Senators, was  
23 entitled:

24 An Act providing for the organization of corporations sole, defining their  
25 powers, authorizing them to transact business and hold property in trust for  
26 religious denominations societies or churches.

S.B. 188 (Journal of Senate, 1915, p. 283) (emphasis added). After its introduction,  
it was referred to the Senate Committee on Corporations other than Municipal. Id. After

1 review by the Committee, recommended that the bill be passed the Senate on March 6,  
2 1915.

3 The bill was subsequently passed by the house on March 10, 1915, and was  
4 approved by the Governor March 15, 1915.

5 The passed Senate Bill 188 became Session Law, Chapter 79. "Organizations and  
6 Powers of Corporations Sole."

7 Section 3 specifically states:

8 . . . . Provided, all property held in such official capacity by such bishop,  
9 overseer or presiding elder, as the case may be, shall be in trust for the use,  
10 purpose, benefit, and behoof of his religious denomination, society or church.

11 S.B. 188 (Session Laws, 1915, Chapter 79, p. 254)

12 As a corporation sole, the Debtor has the power to contract, sue, and be sued in  
13 court. R.C.W. § 24.12.020 (West 2005). A corporation sole also has the power to deal in  
14 real and personal property in the same manner as any natural person. Id. This grant of  
15 legal capacity is explicitly for the benefit of the trust created under this chapter. Id. The  
16 trust is comprised of all the property held by the Debtor in its official capacity. RCW §  
17 24.12.030 (West 2005). Specifically the statutes state:

18 . . . All property held in such official capacity by such bishop, overseer or  
19 presiding elder as the case may be, shall be in trust for the use, purpose,  
20 benefit and behoof of his religious denomination, society or church.

21 RCW § 24.12.030 (West 2005).

22 Every corporation sole shall, for the purpose of the trust, have the power to  
23 contract in the same manner and to the same extent as a natural person, and  
24 may sue and be sued, and may defend in all courts and places, in all matters  
25 and proceedings whatever, and shall have authority to borrow money and  
26 give promissory notes therefor, and to secure the payment of the same by  
mortgage or other lien upon property, real and personal; . . .

RCW § 24.12.020 (West 2005)(emphasis added). This statute defines the legal  
relationship between the Debtor, St. Anne, and Parishioners as a relationship of trustee  
and beneficiary. See, RCW § 24.12.030 (West 2005). This is also consistent with the  
norms of Canon Law which provide that each parish is a Church capable of acquiring and  
owning real and personal property interests.

1 Despite this clear statute and governing principles of Canon Law, the Committee  
2 misconstrues Washington case law explicitly recognizing the restrictions existing on  
3 property impressed with a trust by dedication to religious organizations for the benefit of  
4 such organizations. In Wilkeson v. Rector, etc. St. Luke's Parish, 176 Wash. 377, 386  
5 (1943), cited by the Committee, the Court explicitly notes that while the alienation of the  
6 property in that case was within the power of the trustee, the use of the proceeds from the  
7 sale could not be diverted from the benefit of the religious purposes for which the property  
8 was donated. Wilkeson, 176 Wash. at 385. ("In passing, it may be conceded that, if the  
9 purpose of respondents was to divert the funds to be received from the sale of the property  
10 to other than religious purposes of the Episcopal Church, the court could and would enjoin  
11 them. The trustee is merely the holder of the legal title.") Even the court's explicit holding,  
12 quoted only in part by the Committee, recognizes that courts will ensure that property of a  
13 trust which is held to benefit a religious society cannot lawfully be diverted from the purpose  
14 for which the trust is held. Id. at 386. Specifically, the court stated: "For in a trust of the  
15 character involved here, where no restraint is imposed on the right to alienate, the courts  
16 will not interfere further than to see to it that the proceeds from the sale of the trust property  
17 are not diverted from the use for religious purposes of the faith or denomination to which  
18 the property was dedicated." Id. (emphasis added).

19 Despite the Committee's assertion that "[t]he corporation sole statute's 'trust' for the  
20 Church is no different than the trust in Wilkeson ..." (Committee's Memo, p. 11) the  
21 Committee disregards the court's explicit statements upholding restrictions on the use of  
22 the trust res and its proceeds, and identifying that "[t]he trustee is merely the holder of the  
23 legal title." Id. at 385. The Committee's memorandum repeatedly fails to distinguish  
24 between the rights and obligations of a trustee as the legal title holder of property, and the  
25 existence of an equitable interest in the property, attempting instead, to equate the holding  
26 of legal title by the Catholic Bishop of Spokane with the absence of the existence of a trust.  
This merely evidences a lack of recognition of the distinction between legal title and an  
equitable interest, and does not support the Committee's argument that no trust exists.

The Catholic Bishop of Spokane is the trustee of the statutory trust created under  
RCW chapter 24.12. Whether or not, as trustee, the Catholic Bishop of Spokane has the

1 power to alienate certain property of the trust, any such alienation must be for the "benefit  
2 and behoof of his religious denomination, society or church." RCW § 24.12.030 (West  
3 2005). With regard to "proceeds from the sale of the trust property," they "are not to be  
4 diverted from the use for religious purposes of the faith or denomination." Wilkerson, 176  
5 Wash. at 386. The statutory trust under which the property is held reserves the beneficial  
6 use of the property for St. Anne.

## 7           **2.     St. Anne Is The Beneficiary Of An Express Trust.**

8 The recognition and observance of the civil duties of a trustee have been impressed upon  
9 the Debtor since its incorporation. The Catholic Bishop of Spokane was incorporated as a  
10 corporation sole under the foregoing statute on July 3, 1915. With respect to St. Anne  
11 Parish, this trust relationship commenced with the formation of the Parish. The Washington  
12 Supreme Courts has noted that statements in articles of incorporation can be sufficient to  
13 create an express trust. Hoffman v. Tieton View Methodist Church, 33 Wn.2d at 727  
14 (1949) ("There is no question in our minds but that all property acquired by Tieton View  
15 was, under article VIII of its articles of incorporation ... held in trust for the uses of the  
16 Methodist Church...").

17           The articles of incorporation clearly express the intent of creating and maintaining a  
18 trust for the benefit of the members of the Roman Catholic faith. Specifically, the articles  
19 expressly provide:

### 20                               ARTICLE III

21           This corporation is formed for the purpose of transacting business and  
22 **holding property in trust** for that certain religious denomination or society  
23 known as the Roman Catholic Church; to do business and contract in the  
24 same manner and to the same extent as a natural person; to borrow money  
25 and give promissory notes therefor, and to secure the payment of the same  
26 by mortgage or other lien upon property real and personal; to buy, sell, lease,  
mortgage, and in every way use and deal in real and personal property and to  
receive bequests for its own use or upon trusts.

### 24                               ARTICLE IV

25           The incorporator of this corporation is Augustine F. Schinner, who is the duly  
26 appointed, qualified and acting Roman Catholic Bishop of the Diocese of  
Spokane, in the state of Washington, and who as such Bishop of the Roman

1 Catholic Church has subscribed these Articles of Incorporation, in order to  
2 become a corporation sole, together with his successors in office by his  
3 official designation, in the manner prescribe in "An Act Providing for the  
4 Organization of Corporations Sole, Defining Their Powers, **Authorizing them  
to transact business and hold property in trust for religious  
denominations, societies or churches.**" passed by the Legislature of the  
State of Washington and approved by the Governor, March 15th, 1915.

5 ARTICLE V.

6 This incorporation is a religious corporation, not organized for gain and is  
7 without capital stock, **all property held by it being in trust** for the use,  
purpose, benefit and behoof of the Roman Catholic Church of the Diocese of  
Spokane, in the State of Washington.

8 (Articles of Incorporation, 713115, Emphasis Added)

9 An express trust "arises because of the expressed intent and involves a fiduciary  
10 relationship in which the trustee holds property for the benefit of a third party." Goodman v.  
11 Goodman, 128 Wn.2d 366, 372 (1995). Ninety years ago, the Bishop of Spokane clearly  
12 expressed the intent to hold property in trust for the benefit of the Parishes of the Church of  
the Diocese of Spokane.

13 A trust will be found to exist if there is a clear manifestation of an intent to create a  
14 trust, and the entire instrument, as well as its general purpose and scope, should be  
15 considered, and the instrument should be construed in light of the circumstances  
16 surrounding its execution. See, Hoffman v. Tieton View Meth. Ch., 33 Wn.2d 717, 726  
17 (1949).

18 In this case, the trust instrument consists of the deed, which contains explicit  
19 language referencing the fact title is held by a "Corporation Sole." The statute governing  
20 corporation soles, RCW 24.12 et seq., clearly puts others on notice that a trust relationship  
exists.

21 Just as use and occupancy of property is sufficient to place others on notice of the  
22 possessor's interest, (Miebach v. Colasurdo, 102 Wn.2d 170, 173, 177 (1984)) and the  
23 failure of a spouse to record an interest in community property does not preclude that  
24 spouse from defending that interest in court, (Campbell v. Sandy, 190 Wash. 528, 531  
25 (1937)), the use, improvement and maintenance by St. Anne of property recorded in the  
26 name of a corporation sole, places the world on notice of the statutory trust under which it



1 is held, and identifies the true nature of the Debtor's interest in the property. Cf. In re  
2 Country Club Market, 175 B.R. 1005, 1009 (D. Minn. 1994) (finding a valid statutory trust,  
3 and noting that such a finding creates no burden on creditors "[a]s opposed to contractual  
4 or implied trusts, the stature is public. There is no secret agreement between" the parties.)

5 **1. Statute Of Frauds Does Not Make The Express Trust In This Case**  
6 **Defective.**

7 Generally, the statute of frauds will prevent parol evidence from enforcing the terms  
8 of an oral trust absent fraud or other circumstances. In re Marriage of Lutz, 74 Wn. App.  
9 356, 365 (1994). An exception to the requirement for an express trust over real property is  
10 a situation where a beneficiary of the trust has partially performed in accordance with the  
11 trust. Diel v. Beekman, 7 Wn. App. 139, 144 (1972), overruled on other grounds, Choplin v.  
Sanders, 100 Wn.2d 853 (1984).

12 The standard for evaluating partial performance is whether the beneficiary, with the  
13 consent of the trustee:

- 14 a. Enters into possession of the land;  
15 b. Makes improvements to the land; and  
16 c. Changes position in reliance of the trust.

17 See, Diel at 144-145.

18 As demonstrated in the Statement of Facts in this Memorandum (Section IV), St.  
19 Anne and its parishioners have held possession of the property to the exclusion of all  
20 others. St. Anne has made all improvements to the land and maintained the structures  
21 thereon. All donations have been received with the understanding that St. Anne improved  
22 the real property to fulfill religious tenets of the Parish. Such actions were taken with the  
23 understanding the Church property was property belonging to St. Anne.

24 **C. The Committee Ignores Statutory Restriction On Institutional Funds.**

25 The Committee's discussion of the administrative dissolution of nonprofit  
26 corporations is wholly irrelevant to the enforceability of the restrictions placed on property  
donated to St. Anne under Washington law. This is not an instance of an administrative



1 dissolution by the state, but a reorganization under Title 11 of the United States Code.  
2 Further, St. Anne is subject to the Uniform Management of Institutional Funds Act, RCW  
3 Chapter 24.44, which provides only two methods for the release of a restriction placed on  
4 donations. RCW § 24.44.060.

5 Under Washington law, donations given with restrictions as to their use, to  
6 incorporated or **unincorporated organizations operated for religious**, educational, or  
7 other eleemosynary purposes, can only be used in accordance with the restrictions unless  
8 (1) the donor gives written consent releasing the restriction, or (2) an order is obtained in  
9 Superior Court upon a finding that the restriction is (i) obsolete, (ii) inappropriate, or (iii)  
10 impracticable. R.C.W. § 24.22.060. Further, the statute requires that the Attorney General  
11 be given notice and opportunity to be heard on any such matter before the Superior Court  
12 makes its findings, and expressly retains the application of the judicial doctrine of *cy pres*.  
13 *Id.* Contrary to the claim's of the Committee, Washington's Legislature and Judiciary have  
14 a long and well established tradition of honoring the intention of the donors and benefactors  
15 of religious organizations.

16 The facts of this case demonstrate that the real property at issue was paid for with  
17 donated funds, improved, and maintained with donated funds for the benefit of St. Anne.

18 **D. If The Court Concludes That A Statutory Trust Or An Express Trust Does Not**  
19 **Exist, A Resulting Trust Should Be Found In Favor Of St. Anne.**

20 Even if the statutory and express trusts are found to be ineffective, the acquisition  
21 the property in dispute clearly gives rise to a resulting trust. "It is well settled that where  
22 property is taken in the name of a grantee other than the person advancing the  
23 consideration, the one in whose name title is taken is a resulting trustee for the person who  
24 paid the purchase price, in the absence of proof of a contrary intention." Mading v.  
25 McPhaden, 50 Wn.2d 48, 53 (1957). "That grantee is presumed to hold legal title subject to  
26 the equitable ownership of the person advancing the consideration." Stocker v. Stocker, 74  
Wn. App. 1, 6 (1994) (quoting, Thor v. McDearmid, 63 Wn. App. 193, 206 (1991)).  
"Similarly, where property is transferred to one person and the purchase price is advanced  
by him as a loan to another, a resulting trust arises in the latter's favor." Mading, 50 Wn.2d

1 at 54. Resulting trusts are equitable in nature, and may be established by parole evidence  
2 of a clear, cogent and convincing nature. Stocker, 74 Wn. App. at 6. As evidenced at  
3 Section IV – Statement of Facts – all acquisitions of real and personal property, all  
4 improvements, and all maintenance of the property was paid for with money directly  
5 traceable to parishioners, for the benefit of Parishioners, with the clear understanding and  
6 intent that it was for the benefit of Parish property. Just as in the case of Matter of Torrez,  
7 63 BR 751, 754-755 (9<sup>th</sup> Cir. BAP 1986), the imposition of a resulting trust is appropriate  
8 since title was placed in the name of the corporation sole with the understanding it was held  
9 in trust for St. Anne. The Bishop never intended to actually own the property or assert  
control over the property or improvements as exclusive owner.

10 **E. If The Diocese Is Forced To Breach Its Fiduciary Duty And Trust Relationship**  
11 **owed to St. Anne, A Constructive Trust Must Be Imposed.**

12 The facts surrounding the nature of the relationship between the Debtor, St. Anne,  
13 and the acquisition of the property establish a constructive trust for the benefit of St. Anne.  
14 “A constructive trust is an equitable remedy which arises when the person holding title to  
15 property has an equitable duty to convey it to another on the grounds that they would be  
16 unjustly enriched if permitted to retain it.” Lakewood v. Pierce County, 144 Wn.2d 118, 126  
17 (2001). A constructive trust will be “imposed when there is clear, cogent and convincing  
18 evidence of the basis for impressing the trust.” Id. To establish a constructive trust, a “party  
19 must show the trust arose from the relationship of the parties involved, and that the  
20 property justly belongs to that party.” Id. at 129. Here, the intent of the parties was to  
21 create valid statutory and express trusts, the beneficial use of the property was at all times  
22 held reserved by and for St. Anne. Not only is there clear, cogent and convincing evidence  
23 for the imposition of a trust, but for the Court to hold that the property in dispute belongs to  
24 the Debtor would unjustly enrich the Debtor to the detriment of St. Anne who has relied on  
25 its ownership of the property since the parish was founded.  
26

1 **F. The Committee's Catch All Argument Of "Alter Ego" Fails As A Matter Of Law**  
2 **And Fact.**

3 The "Alter Ego" theory advanced by the Committee is merely a disguised attempt to  
4 circumvent legal deficiencies in its third claim for relief of substantive consolidation. In this  
5 case, the Committee is asking the Court to rule that St. Anne is liable for the debts of the  
6 Debtor, a corporation sole, even though St. Anne is a separate legal entity and is clearly  
7 not a "shareholder" of the Debtor.

8 When Washington Courts invoke "piercing the corporate veil", they have applied the  
9 "doctrine of corporate disregard" based upon two elements:

10 a. "The corporate form must be intentionally used to violate or evade a duty,"  
11 and

12 b. "Disregard must be necessary and required to prevent unjustified loss to the  
13 injured party."

14 See, Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d  
15 689 (1982)

16 The first factor requires a showing of abuse of the corporate form, typically involving  
17 fraud, misrepresentation, or other action **by the corporation that harms the creditor and**  
18 **benefits the shareholder.** The second factor requires that the harm must actually occur.  
19 In this case, the Committee has neither plead nor demonstrated any facts to support both  
20 requirements of an "Alter Ego Claim."

21 The undisputed facts offered by St. Anne demonstrate a claim of "Alter Ego" is  
22 without merit. (See Statement of Facts, Section IV)

23 **1. The Committee Attempts To Circumvent Statutory Prohibitions Against**  
24 **Substantive Consolidation Of A Not "Moneyed" Entity.**

25 The Committee's Complaint, in its third cause of action, seeks a declaratory order for  
26 substantive consolidation "all Diocese Related Entities." The Committee's Motion for  
Summary Judgment now seeks a declaratory order under a theory of "Alter Ego." Such a  
legal theory is nothing more than a thinly veiled attempt to place St. Anne and other non-  
debtor/non-moneyed religious entities into an involuntary bankruptcy. Relief which is

1 forbidden by the Code. See, 11 U.S.C. § 303(a) and corresponding legislative history.  
2 House Report No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess 321 (1977).

3 The Bankruptcy Code clearly recognizes that not all debtors are the same. And  
4 while Chapter 11 and its provisions do not generally distinguish between for-profit, non-  
5 profit, and religious organizations for the purposes of reorganization, that is not to say that  
6 a distinction does not exist and should not or cannot be made. For example, under the  
7 Bankruptcy Code non-profit corporations are treated more favorably than for-profit  
8 organizations. See, e.g., 11 U.S.C. § 303(a) (excluding non-profit organizations from  
9 involuntary bankruptcy); 11 U.S.C. § 1112(c) (forbidding a court from converting a case  
10 filed by a non-profit from Chapter 11 to Chapter 7 without consent). Congress has  
11 recognized that religious organizations present unique bankruptcy issues because  
12 government regulation of religion implicates First Amendment rights. For example, the  
13 Bankruptcy Code has been modified by Congress to protect free exercise of religion to  
14 prevent a trustee from avoiding a debtor's donation given to a religious or charitable  
15 organization. See Religious Liberty and Charitable Donation Protection Act of 1998, Pub.  
16 L. No. 105-183, 112 Stat. 517 (1998).

17 Substantive consolidation has no express statutory basis, but rather, is a "product of  
18 judicial gloss." In re Augie/Restiro Bakery Co. Lt., 860 F.2d 515, 518 (2<sup>nd</sup> Cir. 1988).  
19 Substantive consolidation results in pooling the assets of, and claims against, the two  
20 entities, satisfying liabilities from the resultant common fund, eliminating inter company  
21 claims; and combining creditors of the two companies for purposes of voting on  
22 reorganization plans. In re Bonham, 229 F.3d 750, 764 (9<sup>th</sup> Cir. 2000).

23 In the present case, even if the Committee could get around the statutory  
24 prohibitions, the Committee would have to demonstrate 1) that the Committee or its  
25 members dealt with St. Anne Parish and the Debtor as a single economic unit and did not  
26 rely on the separate credit of each of the entities; or that the operations of the Debtor and  
27 St. Anne Parish were **excessively** entangled with the Debtor's affairs to the extent that  
28 consolidation will benefit all creditors. See In re Bonham, 229 F.3d 750, 766 (9<sup>th</sup> Cir.).

29 The newly surfaced "Alter Ego" theory is nothing more than a recognition that  
30 Committee's third cause of action has no application in this case.

1 **G. Subjecting The Parish To Declaratory Relief of this Nature Violates First**  
2 **Amendment Rights Of Free Exercise And The Religious Freedom Restoration**  
3 **Act.**

4 The exercise of religion includes the "right to believe and profess whatever religious  
5 doctrine one desires" and prevents the government from "lendi[ng] its power to one side or  
6 another in controversies over religious authority or dogma." See Smith, 494 U.S. at 877  
7 (citations omitted). To protect the exercise of religion, the Supreme Court has held that if  
8 the government "substantially burdens" a person's exercise of religion, and the government  
9 does not demonstrate that it has a "compelling government interest" to justify the religious  
10 burden, then the government intrusion into a person's free exercise of religion has been  
11 violated. See Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, this Court later  
12 limited Sherbert by holding that "the right of free exercise does not relieve an individual of  
13 the obligation to comply with a 'valid and neutral law of general applicability . . .'" See  
14 Smith, 494 U.S. at 879 (citations omitted). Public opposition to the Smith holding was  
15 immediate and forceful. Congress enacted the Religious Freedom Restoration Act, 42  
16 U.S.C. § 2000bb-1 (1993)(hereinafter, RFRA), "to restore the compelling interest test as set  
17 forth in Sherbert," and "to guarantee its application in all cases where free exercise of  
18 religion is substantially burdened," including cases in which the law at issue was of "general  
19 applicability." See 42 U.S.C. § 2000bb(b)(1), (2). In Boerne v. Flores, 521 U.S. 507  
20 (1997), the Supreme Court declared RFRA unconstitutional as applied to state actions  
21 because Congress had exceeded the scope of its power under Section 5 of the Fourteenth  
22 Amendment in enacting the law. See Boerne, 521 U.S. at 527 (RFRA "intruded into an  
23 area reserved by the Constitution to the States"). However, RFRA continues to be  
24 constitutional as applied to federal law.

25 Under RFRA, a neutral law of general applicability is an unconstitutional  
26 infringement of a person's free exercise rights if the following is true: (1) the law  
substantially burdens a person's exercise of religion; (2) the government cannot justify the  
law with a compelling government interest; and (3) there are no less restrictive means of  
furthering the government's compelling interest. 42 U.S.C. § 2000bb-1(a), (b).

1 Two unique circumstances arise would occur if the Court were to dictate the  
2 ownership and use of Parish property: (1) a religious leader will have been replaced by a  
3 government official as the head of a religious organization, resulting in comprehensive  
4 government surveillance of religion; and (2) a government official will be in an  
5 unprecedented position of decision making power over a church/Parish, a position  
6 traditionally given only to a spiritually mandated leader, the Pastor of the Parish, resulting in  
7 the appearance of government endorsement of religion for the benefit of a creditor's  
8 committee.

9 St. Anne's economic interests cannot be separated from its spiritual interest – any  
10 economic decision the Court makes regarding use or ownership of property inevitably has  
11 direct and significant religious consequences. Thus, the Court will become hopelessly  
12 entangled with religious policy of the Catholic Church. The effect of St. Anne's spiritual  
13 mission is that every financial decision it makes is driven by religious objectives toward  
14 religious ends in accordance with Canon Law. This creates an irreconcilable church versus  
15 state conflict between a non-debtor, a creditors committee, and the Court. By effectively  
16 forcing a Parish into bankruptcy by way of declaratory relief, the government is changing  
17 the essential structure of St. Anne under Canon Law. Since the Canon directs the religious  
18 vision and thus the financial objectives of St. Anne, such a change would essentially allow  
19 government to determine who benefits from St. Anne's mission.

## 20 VII.

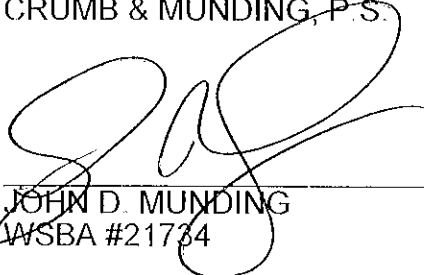
## 21 CONCLUSION

22 As a matter of law, the Committee has not established a case in controversy with St.  
23 Anne that would permit the declaratory relief requested. Even if the Court were to consider  
24 the pending motion for summary judgment based upon the Committee's factual theory, the  
25 Committee's motion fails as the Committee has failed to eliminate material questions of fact  
26

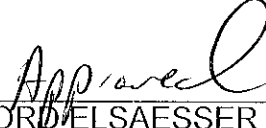
1 as to St. Ann's ownership interest in the real property, including furnishing all consideration  
2 for purchase, improvements, and maintenance.

3  
4 DATED this 25<sup>th</sup> day of May, 2005.

5  
6 CRUMB & MUNDING, P.S.

7  
8   
9 JOHN D. MUNDING  
WSBA #21734

10  
11  
12 ELSAESSER JARZABEK ANDERSON  
13 MARKS ELLIOTT & MCHUGH

14  
15   
16 FORD ELSAESSER  
17 BARRY MCHUGH

18 Attorneys for Defendant Parishes

19  
20 JDM\krc\p:files:assocparishes:summaryjudgment/25044  
21  
22  
23  
24  
25  
26